Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1996

LOUIS TAFUTO,

Petitioner

v.

STATE OF NEW JERSEY

On Petition for Writ of Certiorari
To the Supreme Court of New Jersey

PETITION FOR WRIT OF CERTIORARI

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40pp

QUESTIONS PRESENTED

1. Does the Superior Court Judge violate the Right to a Fair and impartial trial when he has given an opinion on a domestic violence matter at the Dismissal of the Civil Restraining Order Hearing and simultaneous Criminal Arraignment Hearing then hears the same matter as a bench trial in the criminal matter and bases his decision on credibility?

2. Can the Excited Utterance Exception to the Hearsay Rule be used to admit testimony if the declarant had the opportunity to deliberate, fabricate and reflect and testified to doing so, and the State fails to prove its proffer?

3. Is the defendant's right to confrontation violated when the Court refuses to allow the defense to confront the validity, intent and credibility of hearsay testimony through defendant's testimony?

4. Can an error sited by the New Jersey Appellate Court that violates the defendant's Right to Confrontation be deemed "Harmless Error" ?

5. Can the State convict an individual accused of simple assault with no victim, no witnesses, and refuted hearsay testimony?

6. Is defendant's Right to Sufficient Representation denied when the defense attorney admits to not being prepared, not knowing the facts of the case, and fails to object to critical inadmissible hearsay testimony?

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TABLE OF AUTHORITIES

1. N.J.S.A. Code of Criminal Justice. 2C:1 to 2C:16

2. N.J.S.A. Title 2A Administration of Civil and Criminal Justice. 2A:15- 49 (b)(c) and 2A: 84 A Rules of Evidence N.J.R.E. 803 (2) and 63 (4)(b)

3. U.S.C.A. Constitution Amendment VI. Jury Trial for Crimes Procedure Rights.

4. New Jersey Rules of Court.

CASES

Dinter v. Sears Roebuck and Co. 252 N.J. Super 84, 599 A 2d. 528 (A.D. 1991)

Eubanks v. U.S., C.A. Ariz. 1964, 336 F. 2d. 269

Grover v. Universal Underwriters Ins. Co. 80 N.J. 221, 403 A 2d. 448 (1979)

Magill v. Casel. 238 N.J. Super 57.

Matter of J.H.B., Alaska, 1978, 578 P. 2d. 146.

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Stamps v. U.S. C.A. Iowa,1969, 387 F.2d. 993.

State v. Bankston, 63 N.J. 263, 307 A 2d. 65 (1973)

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State v. Carter, 1982, 91 N.J. 86, 449 A. 2d. 1280.

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State v. James E. Thomas 168 N.J. Super 10.

State v. Williams. N.J. Super 170, 254 A 2d. 538 (1969) certification denied 55 N.J. 78 259 A 2d. 228 certiorari denied 90 S. Ct. 1405,397 U.S. 1057, 25 L. Ed. 2d.765

State v. Zenquis, 251 N.J. Super 358, 598 A. 2d, 245 (A.D. 1991) Cert denied. 127 N.J. 563, 606 A. 2d. 374 affirmed 1331 N.J. 84, 618 A 2d. 201,335)

U.S. v. Hinton, 1980, 631 F.2d. 769, 203 U.S. App. D.C. 187.

OPINIONS BELOW

The opinion of the appellate division (App., *infra*, 1a-10a) is unreported. The opinion of the New Jersey Supreme Court (App. *Infra*, 11a) are unreported.

JURISDICTION

The New Jersey Supreme Court entered its judgment on May 8, 1996 (11 a). The Jurisdiction of this court is invoked under U.S.C. 2101.

STATEMENT

The State v. Tafuto comes before the Supreme Court as an appeal of right and Petition for Writ of Certiorari for the Conviction of Louis Tafuto for Simple Assault N.J.S. 2C:12-1 from the Superior Court of New Jersey in Sussex County.

The alleged victim and defendant appeared before the Superior Court of Sussex County on March 10, 1994 for a criminal disorderly persons offense arraignment, dismissal of a Civil Temporary Restraining Order and dismissal of a Civil Domestic Violence Complaint. Defendant was given his rights and arraigned. (Tr. 3/10/94 p.3, L-5, et. seq.) At the same time the alleged victim Virginia Tafuto moved to have the the restraining order, civil complaint and criminal complaint vacated. (Tr. 3/10/94 P. 4 L-13). The court refused to grant Virginia Tafuto's request

> " The Court: It's obvious to the court with visible injuries on your face and the allegations of the complaint being the sixth of March, only four days ago, that - - I'm not going to dismiss it. The matter will be coming before me to trial.
> Mrs. Tafuto: So-- I don't understand. You are telling me that I can't see my husband? Is that what you are saying?
> The Court: I don't believe that it would be- -"

(Tr. 3/10/94 p. 5, L-17) . She argueded that she never wanted to sign a restraining order (Tr. 3/10/94 P-7, L-1). She indicated that the police officer who investigated threatened to impose a four week restraining

order without her consent if she did not sign her own. (Tr. 3/10/94 P. 7 L-18).

After Virginia Tafuto vehemently argued her rights to the Court, the Court reconsidered its position and dismissed the domestic violence complaint and Temporary Restraining Order. The Court then directed the criminal matter to proceed to trial and the court specifically read his observances into the record,

> "The record can note my observances of the face of Mrs. Tafuto. All right that will be all."
> (Tr. 3/10/94 P-8, L-20)

The matter then proceeded as a bench trial before the same Judge on May 26, 1994 and June 30, 1994.The State called Deborah Ann McGovern, a nurse at the St. Anthony's community hospital in Warwick, NY. (Tr. 5/26/94 P-3, L-7). At that time the Ms. McGovern testified that Virginia Tafuto came to the hospital with injuries and appeared anxious, nervous and tense. Ms. McGovern then testified that after prompting, Virginia Tafuto said her husband was the cause of the injuries. (Tr. 5/26/94 P-3 L-25).

On June 30, 1994 the case continued after the Courts's refusal to entertain a motion to recuse himself based on his prejudicial coments at the arraignment. The state called it's second witness Patrolman Mills of the Vernon Township Police Department. (Tr. 6/30/94 P-8, L-12).

The officer testified that on March 6, 1994 he responded to St. Anthony's Hospital in Warwick, New York the emergency room and met Virginia Tafuto. He testified the victim was upset, sobbing and crying. (Tr. 6/30/94 P-10 L-10). He further testified that she had several bruises and abrasions (Tr. 6/30/94 P-10, L-12).

The testimony of the officer was permitted over the objection of counsel. (Tr. 6/30/94 P-11 L-11) . The court permitted the testimony as an exception to the hearsay rule as an excited utterance, pursuant to Evidence Rule 803 (c) (2), " with the condition

the state prove it's proffer of time" (Tr. 6/30/94, P-12 L-2, et. seq.).

Virginia Tafuto testified to vindicate the defendant. She testified that she had received her bruises and abrasions as a result of a rollerblading accident on March 5, 1994, (Tr. 6/30/94 39 L-17). She further explained that she was persuaded to accuse her husband of causing the injuries by the Ms. McGovern's promises of marriage counseling services once authorities were told of a domestic violence situation and mimicked Ms. McGovern's own story of abuse (Tr 6/30/94 P-37 L-20-P38 L-12). She further explained she became upset when she found out her husband would be charged criminally by the police officer and she would be forced to sign a restraining order for four days or the police officer would file a restraining order against her husband on her behalf for thirty days. (Tr. 6/30/94 P-56 L-12-21). She also explained the difficulties she had with Court in her attempts to dissolve the problems incurred by the false complaint. (Tr. 6/30/94 P.45 L 19- P46 L-2).

The defendant testified in his own defense on June 30, 1994. He testified that he was required to leave the home early on the morning of March 6, 1994 and his wife wanted him to stay home. They had a disagreement of his lack of attention to his wife but he was in a hurry to leave. There was no violence.(Tr. 6/30.94, Pg. 67 L-17). After he left he received a phone call while he was at a friend's home from his wife who was looking for him to watch the children so she could go to the hospital.

He attempted to expand on and clarify their conversation, but the court declared its own objection that the testimony would be inadmissible, eventually the prosecution joined in. (Tr. 6/30/94, P-70, L-15 P-72 L-1).

In its final decision, the Court found the out of court hearsay testimony more credible than the declarant. The Court found in favor of the State and against the defendant. Louis Tafuto was sentenced to 20 days in the Sussex County Correctional Facility, 2 years probation, attend and complete an anger management program

DECIDE, and fees and fines.

On February 7, 1996 the Superior Court Appellate Division Affirmed the decision of the Trial Court.

On May 8, 1996 the Supreme Court of New Jersey dismissed the Appeal and Petition for Certification on a motion from the State.

This certification comes before the Supreme Court of the United States in an attempt to acquit Louis Tafuto. The decision to convict the defendant was based on the credibility of two state witnesses unable to prove beyond a reasonable doubt the foundation of their testimony:

1. The origin of injuries they observed.
2. Intent of declarations made by the alleged victim.

Virginia Tafuto testifies that she received the injuries on the previous day rollerblading. She is the only witness to her injuries. There is no victim. There is no crime. The out of court statements testified to by the State's witnesses are explained by the declarant. The statements were coerced and calculated for the purposes of forced and free marriage counseling. The State and Court of Sussex County pushed the Tafuto conviction without a victim, without credible evidence and without reasonable doubt.

This conviction rests on non corroberated hearsay testimony unable to be to cross-examined, judicial partiality and a series of trial errors. A fair and impartial trial and the right to confrontation are the backbone of the United States Criminal Justice System. It is the responsibility of the Supreme Court of the United States to circumvent injustices of State Courts. In the following points, the petitioner will illustrate unrefuted facts that lead to an erroneous conviction and the violation of basic Civil Rights of the defendant.

REASON I-JUDICIAL PREJUDICE

The defendant was denied his constitutional right to a fair and impartial trial by the Court through predisposed statements at the arraignment and prejudicial rulings and comments during trial.

1. Predisposed statements at the arraignment.

The United States Code Annotated Rule 51 states "A judge faced with a potential ground for disqualification ought to consider how his participation in a case looks to the average person on the street. " (Planned Parenthood of SE. PA v. Casey E.D. Pa 1993, 812 F. Supp 541, where the appearance of impartiality is as important as the fact.). Rule 1:12-2(c) NJSA 2A:15-49 (b) states a recusal motion could be based on the grounds that the judge having given an opinion or matter in the question. The comments on March 10, 1994 by the Court gave a clear indication that the judge had a predisposed decision as to the guilt of Louis Tafuto.

Virginia Tafuto was before the Court on March 10, 1994 to dismiss the restraining order and complaint dated March 10, 1994. Simultaneously Louis Tafuto appeared before the court for an arraignment on the same matter. The ensuing dispute between Virginia Tafuto and the Court reveals its perception of the matter before him after the court testified to seeing what appeared to be a bruise on Virginia Tafuto 's chin.

> " The Court: It's obvious to the court with visible injuries on your face and the allegations of the complaint being the sixth of March, only four days ago, that - - I'm not going to dismiss it. The matter will be coming before me to trial.
> Mrs. Tafuto: So-- I don't understand. You are telling me that I can't see my husband? Is that what you are saying?
> The Court: I don't believe that it would be- -"

In this quote it the Judge stops in the middle of 2 sentences that begins "It is obvious. ." and "I don't believe . . " is an inference that the Court a clear opinion on the guilt of Louis Tafuto before the

trial.The Court obstructed Virginia Tafuto's efforts to dismiss all actions, disregarding her accusations of criminal coercion on the part of Officer Arthur Mills. Only after the persistent assertion by Virginia Tafuto of her rights did the Court dismiss the TRO and Domestic Violence Complaint but not without testifying Virginia Tafuto had what appeared to be a bruise on her chin. (Tr. 6/30/94 p-6 l-7 through p-8 l- 21). R. 1:12-1(c) (e) NJSA 2A:15-49c NJSA 2A:15-49d.

On June 30, 1994, the court's refusal to adjourn the trial to produce transcript to investigate the matter further violates the defendant's right to a fair and impartial trial. [Magill v. Casel 238 NJ Super 57]. The case law states:

> "Submission of a recusal motion to the challenged judge is not only required by statute and rule; it is also sound practice. "

and indicates if the transcripts are thought to be relevant when making a motion for recusal on the ground that the court is biased or has incapacity to sit fairly, transcripts must be produced which are sufficiently complete for accurate evaluation R. 2:5-3 (b, c). The Colloquy begins with the request from defense attorney defense counsel after a description of the facts on the record defense counsel states:

> " . . .based on what my client tells me, Your Honor he believes you may have prejudged this matter.
> He was concerned about the remarks you made to him."

The Court asks for specifics and Mr. Aprile makes his application to the court for an adjournment to produce the transcripts for the day in question (Tr. 6/30/94 p-5 l-1- l-4)

The Court then sums up the request to adjourn to produce transcripts for the March 10, 1994 argument:

> "The defendant appeared before the court on March 10, at which time he was advised his rights by the court with regard to this particular complaint summons.
> And I certainly have no recollection of any comment by me that would indicate a prejudice on my part. As my practice

would indicate in these types of matters, the court advises all litigants and litigants especially in this category who are subject to a disorderly persons complaint summons, as to what their rights are. And that was done in this case.

But I have no recollection whatsoever of any comments of that nature and I am not going to further adjourn this."

In Magill v. Casel, the fact that the Judge had no recollection would meet the criteria to adjourn the case. The Court refuses to give the opportunity to the defendant to procure a fair and impartial trial while claiming he did not remember any particulars of the case thus disregarding R. 2:5-3 (b, c) and R.1:12-1 as drawn out in Magill v. Casel.

2. Prejudicial rulings and comments during trial.

During testimony the Court continues to make contradictory rulings, prejudicial comments and objections on behalf of the State:

1. Time constrictions.

On page 6 (line 21) - 8 (line 3) of the 6/30/94 transcript The Court denies the request for an adjournment based on the declaration that defense counsel was ill prepared for trial. Further down on the court limits the completion time of the trial stating that

"It's now 2:25 and the longer Counsel speaks the less time there will be to try this case." (Tr. 6/30/94 P-8 l-3).

On the conclusion of the testimony of Arthur Mills defense counsel attempts to explain one more time his dilemma in being unprepared for the case and again requests more time for a witness that could not make it, the Judge once again denies the adjournment request and restricts the time limit to finish the case.

"We are going to end this today." (Tr. 6/30/94 p-32 L-7).

These comments of the court illustrate a lack of patience and veracity through an interest to beat the clock instead of find the facts.

2. Prejudicial Rulings.

During the testimony of Arthur Mills on June 30, 1994 the Court overruled defense counsel objections concerning Arthur Mills testimony that "she obviously took a beating." (Tr. 6/30/94 p-10 l-12 through l-16) When defense counsel attempts to refute the testimony of Mills that "She obviously took a beating." during cross examination the court then disallows any testimony concerning other possible origins of the bruises (Tr. 6/30/94 p-24 l-1 through l-25 and p-25 l-1 through 5).

This compromises the courts autocracy in this ruling for the State's witness. Its fulther discredits the possibility of impartiality disallowing latitude to the defense in its cross examination of this comment.

3. Prejudicial Statements.

When Virginia Tafuto takes the stand for the defense the Court comments for the record "Ms. Tafuto, just to let you know, the Court has instructed the defendant not to engage you in any non verbal communication during the course of your testimony." (Tr. 6/30/94 p-36 l-15 through l-17). This statement is devoid of a request by Virginia Tafuto. It is made at the end of the State's case. It is placed on the record. The statement infers Virginia Tafuto should be concerned. It prejudicially sets the tone for the credibility of testimony to come.

4. Denial of Right to Confrontation.

During Louis Tafuto's direct Testimony the Court precludes Louis Tafuto from testifying to statements by Virginia Tafuto made to him around the time she was going to the hospital when the court already allowed the testimony into evidence through two state's witnesses (Tr. 6/30/94 p-70 l-24-p-71 l-24). The Court initiates the objection which was deemed erroneous by the Appellate Division.

The court represents little concern for the appearance of impartiality and displays little empathy to the right of the accused. An independent and honorable judiciary is indispensable to justice in our society. Through the trial Court's prejudicial comments on March 6,

1994, his inconsistent ruling during testimony, his time limits imposed on the defense to finish the case, and comments to Virginia Tafuto as she took the stand, the Court violated R. 1:12-1(c) (e) and the case law defined in Magill v. Casel denying the defendant the Right to a Fair and Impartial Trial.

REASON II- EXCITED UTTERANCE

The admission of the hearsay testimony from Deborah McGovern and Arthur Mills was reversible error because the hearsay statements did not meet the criteria to place them in the Excited Utterance exception to the Hearsay Rule and the State failed to prove its proffer.

1. The hearsay statements did not meet the criteria to place them in the Excited Utterance exception to the Hearsay Rule.

The prongs of the excited utterance test require that it be proven that the declarant make the statement within a reasonable proximity to the event or without opportunity to deliberate, fabricate, or reflect. [See: State v. Williams 106 NJ Super 170]. Other factors considered in determining whether a statement falls under the excited utterance exception are the amount of time transpired, declarant's conduct during such lapse of time, and the excited state of the declarant.

Testimony states that Virginia Tafuto last saw her husband around 7:00 AM. In the time between when she last saw her husband 7:00 AM and when she appeared at the hospital 11:21 AM Virginia Tafuto set her children up with a babysitter [Tr. 6/30/94 p-42 l-16-33] , drove herself to the emergency room of Saint Anthony's hospital in Warwick, N.Y. (12 miles) [Tr. 6/30/94 p-35 l-14] and filled out appropriate papers [Tr. 5/26/94 p-7 l-19] before coming in

contact with Deborah McGovern. Virginia Tafuto in the lapsed time (at least 4 hours) from when she last saw Louis Tafuto and made her statements, performed many tasks requiring reflective thought allowing her the opportunity to deliberate or fabricate her accusations of assault against the defendant at her arrival at the hospital.

Deborah McGovern's testimony further reveals that Virginia Tafuto's statements against her husband were in response to questions [Dinter v. Sear Roebuck & Co. 252 NJ Super 84, 599 A2d. 528 (A.D. 1991)]

> "And when I talked to her it started to come out it was her husband."
> "I wanted to know if she was kicked. Was she hit with an object?"

This type of testimony discredits the possibility of the statements to follow such questioning to be an excited utterance. Deborah McGovern's questions open the door of opportunity and invite Virginia Tafuto to fabricate an allegation. [State v. Williams supra.]

2. The State failed to prove its proffer.

In addition to the above mentioned discrepancy, the burden of proof was on the State to prove the proffer of time. After the objection of defense counsel to testimony being admitted into evidence in regards to alleged statements made by Virginia Tafuto to Arthur Mills, the Court states:

> "The proffer by the state is that the event occurred at approximately 9:30 AM subject to that being confirmed . . . this type of question is permitted as an exception to the hearsay rule."

Virginia Tafuto testified that the last time she saw her husband was around 7:00 AM the defendant testified the same indicating a 4-5 hour lapse of time [State v. Jano, 524 So. 2d. 660 (Fla. 1998)]. Virginia Tafuto also testified that Arthur Mills filled out the Police Reports and Domestic Violence Report. She testified that she signed the Domestic

Violence Report under the duress of fearing she would not be able to see her husband for a month. The criminal complaint was filed and signed by Arthur Mills. The only proof the state has that a startling event took place at 9:30 AM is a Domestic Violence Complaint that was dismissed on March 10, 1994, filled out by Arthur Mills and signed under protest by Virginia Tafuto. Clearly the state did not prove its time proffer.

The court uses State v. Bass [221 NJ Super 466] and State v. Williams [214 NJ Super 12] to support its ruling to accept the testimony as an Excited Utterance to the Hearsay Rule. State v. Bass concerns the statement of a 6 year old who made a statement six hours after witnessing the death of a sibling.The declarant in State v. Bass was deemed by a psychiatrist unable to testify before against his parents who were charged with the death. Clearly the differences in State v. Bass and State v. Tafuto are extraordinary. Virginia Tafuto was in her early thirties at the time of trial. There was no psychiatric testimony stating she could not testify before her husband. Virginia Tafuto in fact testified on behalf of her husband. State v. Williams concerns a situation where the declarant performed no tasks requiring reflective thought prior to a police officer being dispatched to the scene of the crime, then collapsed upon the police officer's arrival. In the State v. Tafuto the police officer was dispatched to Warwick, N.Y. after we have seen a series of tasks performed by the declarant requiring reflective thought.

In conclusion, the circumstances of this critical hearsay testimony does not provide sufficient information to access reliability. The Excited Utterance is an exception. In order to allow this exception the burden of proof must be on the state to securely fit the facts of the case into the exception to the rule. Since the state failed to set forth any of the criteria to meet the excited utterance rule, the hearsay testimony is not competent. Its admission by the trial and appellate court was erroneous. This testimony was the backbone of the conviction of the defendant. The conviction should be overturned and

the defendant should be acquitted. [See: State v. Bankston 63 NJ 263, 307 A2 2d. 65 (1973).] [Grove v. Universal underwriters Ins. Co. 80 N.J. 221, 403 A 2d. 448 (1979)]

REASON III-RIGHT TO CONFRONTATION

The admission of inappropriate hearsay testimony under the Excited Utterance Exception to the hearsay rule Violates the Sixth Amendment Right to Confrontation. [State v. Bankston 63 NJ 263, 307 A2d 65 1973]

1. Defendant could not confront an accuser who admitted under oath she fabricated the accusation.

The United States Code Annotated Rule 65 states that the in determining the credibility of the declarant, live testimony with opportunity for face to face is the most reliable method for telling the truth. It supports the defendants Sixth Amendment Right to Confrontation . In the instance of the State v. Tafuto this confrontation clause was used against the defendant in determining the testimony of Virginia Tafuto at the time of the trial.

State v. Sego 266 NJ Super 406 629 a 2d 1362 (AD 1993) contradicts the claim by imploring the concern that a declarant my be in fear of their retribution. This was not the case in the State v. Tafuto. On March 10, 1994 at Virginia Tafuto's request to dismiss the actions the judge asks if anyone is forcing Mrs. Tafuto to vacate the restraining order. Virginia Tafuto says "No." (Tr. 3/10/94 p- 4 l- 16-17) The Court asks again if the defendant is applying pressure on Mrs. Tafuto and she repeats "No." (IBID lines 21-23). She continues to argue vehemently that the court had no right to control her destiny (Tr. 3/10/94 P- 6 l- 11 through P-8 l-15) Reluctantly the court agreed with this argument in the Civil proceeding but the same court when it came to the criminal proceeding disagreed with Virginia and convicted Louis Tafuto.

On June 30, 1994 as Virginia Tafuto takes the stand in support of the defense the court states: "Ms. Tafuto, just to let you know the Court has instructed the defendant not to engage you in any non-verbal communication during the course of your testimony."

(Tr. 6/30/94 p- 36 l- 15-17) Further into Direct Examinatien of Virginia Tafuto she is asked by counsel if any one coerced her or threatened her in any way. She responds "No. No. " The question is redefined by counsel, "No one at all?" She responds "No one at all." (Tr. 6/30/94 p-36 l- 21-l-25). Virginia Tafuto, on the stand and admits before the court under oath that she was not assaulted and repeatedly defies the State and the Court in their efforts to treat her as much.

Virginia Tafuto admitted her role in this false complaint and even testified she considered retaining counsel in doing so. (Tr.6/30/94 p.48). If Virginia Tafuto had testified as a witness for the state and the testimony about existing rollerblading injuries and her reasons for making the statements against her husband came out in cross-examination the credibility issue would have benefited the defense. For a defendant to be subject to full and effective cross-examination by the defendant he must be called by the State thus to insure the right of Confrontation is not abridged [State v. Fisher, 1977,573 P.2d. 1012, 222 Kan. 76.] Virginia Tafuto's attempts to clear up the accusations as a defense witness in a false complaint was used against the defendant in his trial. Under oath Virginia Tafuto stood before the accused, the Court and the State and explained her actions and feelings (Tr. 6/30/94 p- 47 l- 1- l-25).

The State's witnesses were not responsible for the validity of or intent for such comments. Deborah McGovern and Arthur Mills testify they are convinced by the words of Virginia Tafuto, but Arthur Mills sums up the entire problem arising out of this conviction

"I only know what was told to me." (6/3094 pg 23 line 17-22).

Arthur Mills nor Deborah McGovern can prove beyond a reasonable doubt the intention of Virginia Tafuto and the meaning behind her alleged statements to them. They did not make the statements. [State v. James E. Thomas 168 NJ Super 10]. This

peculiar dilemma is unique from any other hearsay testimony because it was the mainstay in convicting Louis Tafuto yet the ability to confront it is non existent. The State v. Zenquis [251 NJ Super 358, 598 A 2d. 245 (AD 1991) Cert denied 127 NJ 563 606 A 2d. 374 affirmed 1331 NJ 84, 618 A 2d. 201 335] explains where there exists an inability of defendant to confront testimony introduced as evidence there also exists a violation of the 6th Amendment Right.

2. Court refused to allow defense to confront validity and intent of hearsay testimony and credibility of alleged victim's testimony.

In the State v. Tafuto the prosecutor and the court postulate the exception to the rule by stating that as long as the declarant remains under the excited state of the startling event the statements can be used as an excited utterance. There exists descriptive testimony from the Deborah McGovern (the first State's witness) concerning the demeanor of Virginia Tafuto. Although without objection from defense counsel, Deborah McGovern's comments in regards to her initial impression of Virginia Tafuto are conclusionary:

> "really anxious, very nervous, upset, just really tense." [Tr. 5/26/94 p-3, l-22]

The Arthur Mills also testifies for the State on behalf of Virginia's state of mind during her declarations.

The transcripts reveal two State witnesses testifying to the state of mind of Virginia Tafuto. The defense attempts to refute the testimony of the State through Virginia Tafuto, the declarant, as to her own state of mind, (DECISION) Louis Tafuto as to her actions and comments to him prior to her refuted statements(Tr. 6/30/94 p-70 l-24-p-71 l-24), and another witness to testify at a later date(Tr. 6/30/94 p-32). [State v. Benedetto, 120 N.J. 250, 576 A 2d. 828 (1990)]. The Court found Virginia Tafuto not credible to her own state of mind (DECISION) while refusing to hear Louis Tafuto testify as to his communications with the declarant (Tr.6/30/94 p-70 l-24), and

refusing to carry the case an extra day for the testimony of a third defense witness (Tr6/30/94 p-32).

The court had before it testimony from the declarant that she fabricated the story of abuse. As the sole finder of facts, it was the courts responsibility to allow opportunity for testimony from the defense which may bolster the testimony of the declarant. This would place the burden of Proof back on the State. The court's decisions eradicated the credibility of the truthfulness and reliability of any critical hearsay statements.([Matter of J.H.B., Alaska 1978, 578 P. 2d. 146.] [State v. Bankston 63 NJ 263, 307 A2d 65 1973]). In State v. Cigliata the focus of the issue is primarily on whether the circumstances surrounding the hearsay provides sufficient information to access reliability. In the matter of the State v. Tafuto it does not. [State v. Cugliata Me. 1977, 372 A 2d. 1019, certiorari denied 98 S. Ct. 177, 434 U.S. 856, 54 L Ed. 2d.128].[

Claims under the Right to confrontation are tested against the importance of refuted testimony and whether the testimony bears other reliability [Reardon v. Manson, D.C. Conn, 1980, 491 F. Supp. 982, remanded on other grounds 644 F. 2d 122, on remand 617 F. Supp 932.]. The declarant herself contends the statements made and her purpose for making them placing serious doubt on the reliability. The hearsay evidence along with the visible injuries were the only proofs for a conviction, without the hearsay testimony there would not be a conviction. The defendant was denied his right to confrontation.

REASON IV-APPELLATE HARMLESS ERROR

Erroneous hearsay testimony cannot be considered harmless by the Appellate Division in this case because the testimony violates the Right to Confrontation [State v Bankeston, supra.].

The denial of defendant's right to testify to statements of Virginia Tafuto prior to her excited utterance statements was "reversible error" because the testimony excluded was the only

opportunity for defendant to confront the hearsay testimony of Arthur Mills and Deborah McGovern compromised his Constitutional Right to Confront a Witness.

The United States Code Annotated Constitution Amendment VI the right to confront a witness whose testimony is to be used against him is so fundamental that its recognition is required in state trials. The Appellate Division acknowledges the error by the Trial Court in refusing to admit the testimony of Louis Tafuto in regards to his wife's comments over the telephone before she left their home for the hospital. (Tr. 6/30/94 p-70 l-5 -l-7 l-17). There is no way of determining where the case would have ended up. The testimony suppressed was not a definitive piece of evidence wherein the appellate court or the trial court could evaluate the beginning and the end of it to determine its weight and credibility. The testimony would have to be heard in its entirety in order to evaluate its value. The Appellate decision states "We can discern no reason why the admission of defendant's testimony would have made and difference in the Judge's assessment and decision to convict." This could only be true if he was predisposed. In his decision Judge Conforti puts most the credibility issue on Virginia Tafuto's alleged statements at the hospital and her testimony at trial (Tr. 6/30/94 p-101-p-108). Without allowing for testimony by the defendant of Virginia Tafuto's other statements at the time when she is assumed to be in a continued state of excitement from a startling event, it would be unfair to determine whether or not her statements made to Arthur Mills and Deborah McGovern were accurate and valid without an avenue to dispute the testimony. The court did not have all the evidence available to weigh credibility. The additional testimony could have lead the credibility issue to question the validity of statements made to Deborah McGovern and Arthur Mills instead of questioning the credibility of her testimony at the time of trial. In order for the Appellate Court to determine "harmless" error in this issue it would have to assume Judge Conforti could make a credibility decision prior to the

completion of the defendant's testimony and without all the evidence.

The error described in the aforementioned Appellate Court decision not only indicates a violation the defendant's Constitutional Right to a Fair and Impartial Trial but is plain reversible error because the "Real Possibility" that a violation of this civil right affected the result of this trial. [State v. Carter. 1982, 91 NJ 86 449 A2d. 1280.]. The decision of the trial court should therefore be reversed.

REASON V-BURDEN OF PROOF

State failed to meet Burden of Proof pursuant to N.J.S.A 2C:12-1, 2C:1-13 (a), 2C:1-14 h(3) (a-e):

The State failed to prove beyond reasonable doubt the causal affect of the injuries of Virginia Tafuto with simple assault charge. Virginia Tafuto's testimony as laid out in the Excited Utterance Arguments and Right to Confrontation Arguments interjects a reasonable doubt. The State has no corroborating witnesses to fortify its claim. The State's witnesses can only testify to the injuries they saw and what is questionably acceptable hearsay testimony. The state does not have an offense committed without the corroboration of the alleged victim. What we havein this case is therfore a conviction based the testimony of two witnesses, the foundation for which was not clearly established; ie. whether there was opportunity for fabrication or confrontation. The Court concluded guilt based upon those exceptions to the hearsay rule without the alleged victim having been called to testify by the proponent of the testimony.

The Court further exacerbated this evidentiary crisis by its partial consideration of all the evidence by precluding the defendant from testifying to the conversation he had with his wife. The Appellate Division justifies this mistake as harmless error yet it was crucial in the elements to refute the state of mind of Virginia Tafuto in her declarations.

The Presumption of innocence is stronger and a jury is bound

to follow this presumption which is not overcome unless the State has proven every element beyond a reasonable doubt. (N.J.R.E. Rules 13-14) Reasonable doubt is an honest and responsible uncertainty as to the guilt of the defendant existing after a full and impartial consideration to all the evidence (Model Jury charges. Ciminal (2d. e.) pg 269.). As pointed out by the Appellate Division (app, infra, 1a-10a), the Court in trying this case did not have a full consideration of the evidence (defendant's testimony of wife's statement), although the Appellate Division deemed it harmless error.

In addition this instance of duplicity of the court with Chancery Family Court Judge responsibilities lingering among Criminal Trial Court responsibilities placed the defendant's rights to a fair and impartial trial into question. Sitting both as a family court justice and Criminal court justice on the same case compromised the integrity and impartiality of the court.Family court responsibilities lie civilly in the interest of of the family and on the preponderance of evidence. Criminal Court responsibilities lie in procuring a fair and impartial trial and weighing the facts beyond reasonable doubt to sustain a conviction. In the transcripts for the criminal trail there exist traces of the elements of the civil matters that were heard simultaneously but tied into the criminal proofs:

1. The dismissed domestic violence complaint from 3/10/96 used to support state's proffer.
2. The opinions by the Court concerning a Civil Temporary Restraining order at the time of defendants arraignment.
3. Continuous attempts to allegedly protect a wife who requests no protection during trial and arraignment.

In conclusion, the court acted in the interest of domestic violence as a social issue instead of in the interest of justice. By way of his comments and recorded observances at the arraignment, his duplicity as a Family Court Justice and Criminal Court Justice in the same case and his rulings and objections at the trial, the court painted

a picture of domestic violence and assault without a meeting the burden of proof.

There exists the real possibility that the court imposed a preponderance of the evidence filter in determining whether or not the State had proved its requisite for Reasonable doubt N.J.S.A. 2C:12-1 and 2C:1-14.

REASON VI-INSUFFICIENT COUNSEL

Defendant was denied the right to sufficient representation at the trial level the Sixth Amendment right to the U.S. Constitution.

Defense counsel represented he was unprepared for the first and second day of trial. Represented he was going to have to go along with the testimony and handle the case as to what he heard (Tr. 6/30/94 p-3-p-6). This statement is suppourted through his handling of basic trial court objections. Defense counsel failed to object to Hearsay testimony of Deborah McGovern (Tr. 5/26/94), costing the right for the argument of hearsay to be considered on the Appellate Level (See App. infra 1a-10a) Defendant failed to object to conclusionary statements of Deborah McGovern (Tr.5/26/94, p-3,l-22). On the second date of trial defense sends an adjornment request to the court based on an ongoing trial. He indicates before the court that the prosecution gave the reference that the case would be adjorned to after July 1, 1994 (Tr. 6/30/94 p-.4 p-5). The court refuses the request. Counsel then speaks vaguely of an adjornment request to procure transcipts. In this coloquoy the defense counsel reiterates his lack of knowledge on the facts of the case but is forced to go to trial(Tr. 6/30/94 p-4-p-6). Later defense request a continuance to place another witness on the stand(Tr.6/30/94 P-8 L-3). Adjornment denied. Testimony supports defense claim of insufficient counsel. His choices are uninformed because of inadequet preparation or are not arguable a product of tactical decision (U.S. v. Hinton, 1980, 631 F.2d. 769, 203 U.S. App. D.C. 187.).

Whether time allowed defense counsel adequet time to prepare for the case depends upon the nature of the charge, issues presented, and availabillity of pertinent witnesses. (Tr. 6/30/94 P-4-P-6) The nature of this charge was fairly common. The issues presented at the onset of this case were unique. Issues such as accusations of judicial prejudice at the time of the arraignment would incur cost and time to transcribe testimony. The fact that the alleged victim would be a winess for the State is a unique occurance requiring tactical solutions and background information. Finally the availability of one witness for the defense obstructed defense counsel's ability to effectively and tactically defend his client. (Stamps v. U.S. C.A. Iowa,1969, 387 F.2d. 993. See also Eubanks v. U.S., C.A. Ariz. 1964, 336 F. 2d. 269; Ray v. U.S. C.A. Ark. 1952, 197 F.2d. 268.)

Defense Counsel should have had the opportunity to adequetly prepare for the unique circumstances of this case. (Stamps v. U.S., C.A.

CONCLUSION

State v. Tafuto not only to presents a questions of general public importance regarding Criminal proofs in complaints arising out of domestic violence legislation that need to be settled by the court but argues substantial constitutional issues and reversable errors on the Trial and Appellate Levels which led to an erroneous conviction of Louis Tafuto. Domestic violence legislation has steam rolled through the New Jersey legislator giving the courts extreme latitude in its dealings with criminal cases. It is the duty of the United States Supreme Court to enforce the rights of the accused. Virginia Tafuto's rights were ignored, as a complaintant, Louis Tafuto's rights were ignored as a defendant, and their rights as a family were trampled on. The State v. Tafuto must become the case that will help define the constitutional boundaries in the criminal justice system for this new legislation and social outlook on domestic violence.

APPENDIX A

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-003048-94T5

STATE OF NEW JERSEY

Plaintiff-Respondent,

v.

LOUIS S. TAFUTO,

Defendant-Appellant.

Argued: January 24, 1996
Decided: February 22, 1996

Before Judges Shebell and Newman.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Sussex County, and from Superior Court of New Jersey, Law Division, Sussex County.

George T. Daggett argued for appellant (Daggett & Kraemer, attorneys; Mr. Daggett, of counsel and on the brief).

Thomas E. Bracken, Assistant Prosecutor, argued for respondent (Dennis O'Leary, Sussex County Prosecutor, attorney; Mr. Bracken, of counsel and on the brief; Merrill M. Mezzacappa, Assistant Prosecutor, on the brief).

PER CURIUM

Defendant Louis Tafuto was found guilty by a judge of the Chancery Division, Family Part, of the disorderly persons offense of simple assault (N.J.S.A. 2C:12-1(a)(1)) for assaulting his wife. Defendant was sentenced to twenty days in jail to be served on weekends, probation for two years, a $25 per month probation supervisory fee, completion of the DECIDE Program dealing with anger management, a $250 Violent Ces Compensation Board penalty and a $75 Safe and Secure Community Program assessment.

Defendant filed a notice of appeal from this judgment to the Law Division, contending that the Family Part judge had sat in the place of the Municipal Court of Vernon Township and that he

was therefore entitled to a trial de novo in the Law Division under R. 3:23. That appeal was dismissed without prejudice to defendant's appealing to this court. Defendant appeals both the judgment of conviction and the order dismissing his appeal to the Law Division. We affirm.

The facts developed at trial are as follows: On March 6, 1994, defendant's wife, Virginia Tafuto (Mrs. Tafuto), arrived at St. Anthony's Community Hospital in Warwick, New York with bruises and abrasions on her face, neck and body. At the hospital, she saw a nurse, Deborah Ann McGovern (McGovern). McGovern testified that Mrs. Tafuto was really anxious and upset when she came to the hospital. At first, Mrs. Tafuto said that she was hit by "somebody" and that she wanted to be treated. Eventually, she told McGovern that she was hit by her husband and that he hit her with his hands and fists several times. McGovern also examined Mrs. Tafuto and saw that she had a bruised and swollen jaw, that her lip was bruised and swollen, that her neck had marks around it and her forearms and flank had marks on them.

The police were summoned and Patrolman Arthur R. Mills (Mills) came to the hospital. Mrs. Tafuto told him the same story. Mills observed

that Mrs. Tafuto had abrasions on her forehead, a bloodied, bruised and swollen lower lip and jaw area and abrasions on her neck. He also observed that the lip injury appeared to him to be a fresh injury and that "[s]he had obviously taken a beating". Mills testified that she was very upset, sobbing and crying and very emotionally distraught. Mills testified that Mrs. Tafuto told him that when she spoke to defendant about spending more time with her, he became very upset and beat her. Mrs. Tafuto indicated to Mills that she did not want any criminal charges to be filed against defendant. When Mills told her that steps were going to be taken against defendant regardless of her request, she "was absolutely horrified," stating that "its' going to make it worse." She began crying more violently.

Mrs. Tafuto testified that she did not want to sign a restraining order against defendant, but was told by Mills that if she did not sign a four-day restraining order, he would sign a 30-day restraining order and prosecute him criminally.

Forty-five minutes after leaving the hospital, Mrs. Tafuto reported to Vernon Police Headquarters on her own to complete a domestic violence complaint. According to Mills, she was calmer than before but was still visibly upset. She further described

the assault and claimed that defendant had struck her several times about the head and chest and grabbed her around the neck. Mrs. Tafuto signed the domestic violence complaint and a 4-day restraining order.

At trial, defendant did not object to McGovern's testimony and the trial judge ruled that Mills' testimony was admissible under the "excited utterance" hearsay exception.

Mrs. Tafuto testified for the defense, claiming that she had lied about the source of her injuries which actually had been sustained in a rollerblading accident the day before she went to the hospital. Defendant denied having beaten Mrs. Tafuto and attempted to testify that she had called him before going to the hospital to tell him that she had been in a rollerblading accident. However, the judge held that this testimony was inadmissible hearsay.

The trial judge found the testimony of the nurse and police officer more credible than that of the Tafutos and found defendant guilty of simple assault.

On appeal, defendant raises the following arguments:

POINT I

THE COURT ERRED IN ITS EQUITABLE APPLICATION OF THE RULES OF EVIDENCE.

POINT II

THE DEFENDANT WAS DEPRIVED OF A TRIAL DE NOVO IN THE SUPERIOR COURT.

Defendant argues in Point I that the trial judge erred in ruling that McGovern's testimony regarding Mrs. Tafuto's statements to her was admissible despite the fact that those statements were hearsay. Because defendant did not object to McGovern's testimony, we did not consider the issue on appeal. R. 2:6-2. In addition, McGovern's testimony recounting what Mrs. Tafuto told her was admissible under N.J.R.E. 803(c)(4) as statements made in good faith for purposes of medical treatment. However, because defendant raises the same argument as to the applicability of the excited utterance exception to the hearsay rule by way of objection to Officer Mills' testimony, we address the issue applicable to both the testimony of McGovern and Mills.

N.J.R.E. 803 (c)(2) defines the "excited utterance" exception to the hearsay rule as follows:

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate or fabricate.

The "excited utterance" exception is based upon the premise that the excitement caused by the observation of a startling event insures the reliability of a spontaneous statement about it made at or near the time of the event's occurrence. Biunno, Current N.J. Rules of Evidence, Comment 1 to N.J.R.E. 803 (c)(2) (1995). The rule does not require the statement to have been made contemporaneously with or even immediately after the event causing the excitement. Ibid. It is the presence of a continuing state of excitement that contraindicates fabrication and furnishes trustworthiness. Ibid.; Cestero v. Ferrara, 57 N.J. 497 (1971); State v. Lyle, 73 N.J.403 (1977). See also State v. Bass, 221 N.J. Super. 466, 482-83 (App. Div. 1987), certif. denied, 110 N.J. 186 (1988) (statement admitted as excited utterance after lapse of six hours).

Her, McGovern's testimony about Mrs. Tafuto's statements to her was clearly hearsay since the statements were offered to prove their truth; that is, defendant had inflicted Mrs. Tafuto's injuries. However, the "excited utterance" hearsay exception applied to McGovern's testimony. Mrs. Tafuto's statement to McGovern related to a startling event, her having been beaten by

defendant. Her statements were made while she was still under the "stress of excitement" caused by the beating. McGovern testified that Mrs. Tafuto was still very anxious, upset and afraid as a result of the incident when she made the statements. That a few hours at most had passed since the abuse does not change the fact that Mrs. Tafuto was clearly still "excited" at the time she made the statements to McGovern.

The same reasoning applies to Mills' testimony regarding Mrs. Tafuto's statements to him at the hospital. Mills' testified that Mrs. Tafuto was crying and was very upset and "emotionally distraught" when she told him that her husband had beaten her. While the additional information which Mrs. Tafuto imparted to Mills at the police station was under less excitement, the aftermath of the events had not dissipated to a point where the excitement was removed from what she had to say. She was still upset although calmer. Even if that brief portion of Mills' testimony regarding Mrs. Tafuto's statements at the police headquarters should not have been admitted, the error would be harmless. R. 2:10-2. Because the trial judge found Mills and McGovern to be credible, but found that the Tafutos' courtroom testimony was not, he clearly would have arrived at the same result, even without considering Mrs. Tafuto's statements at the station.

Defendant also argues that the trial judge erred in ruling that defendant's testimony regarding Mrs. Tafuto's statements

to him about going the hospital because she had a rollerblading accident was inadmissible as being hearsay and self-serving. We agree. Defendant asserts that the testimony should have been admitted under any of the following exception to the hearsay rule: (1) the N.J.R.E. 803(c)(3) hearsay exception for "then existing physical condition"; (2) the N.J.R.E. 803 (a)(1) hearsay exception for prior inconsistent statements; and (3) as evidence that Mrs. Tafuto had an "opportunity to fabricate" such that the testimony of Mills and McGovern should not have been admitted under the "excited utterance" hearsay exception.

Addressing defendant's second argument first, the statement of Mrs. Tafuto about which defendant sought to testify was consistent, not inconsistent, with Mrs. Tafuto's in-court testimony and therefore must be analyzed under N.J.R.E. 803(a)(2), not N.J.R.E. 803 (a)(1). Defendant's testimony was admissible under N.J.R.E. 803 (a)(2) because it rebutted the State's implied charge that Mrs. Tafuto, in testifying that she had been injured in a rollerblading accident, had "recently fabricated" this story or had offered it under the improper influence of defendant's threats. While the trial court erred in refusing to admit defendant's testimony, we find the error harmless. R. 2:10-2. The trial judge believed the earlier version given by Mrs. Tafuto as recounted in the testimony of McGovern and Mills over that of defendant and Mrs. Tafuto. State v. Johnson, 42 N.J. 146, 161 (1964). We can discern no reasons why the admission of defendant's testimony would have made any

difference in the judge's credibility assessment and decision to convict.

As for defendant's argument under the N.J.R.E. 803 (c)(3) hearsay exception, it need not be addressed because we have already held that the testimony should have been admitted but the error was harmless. Regarding defendant's third argument, it is without merit. R. 2:11-3(e)(2).

Defendant argues in Point II that under R. 3:23, he should have been allowed to appeal his conviction in the Family Part of the Chancery Division to the Law Division for a trial de novo rather than to the Appellate Division. Defendant contends Judge Conforti [of the Chancery Division] sat as a judge of the municipal court, in which case defendant would then have been entitled to appeal to the Law Division of the Superior Court.

We reject defendant's argument because Judge Conforti was not acting as a municipal court judge. His order states that it is from the Chancery Division. More importantly, R. 5:1-2(c)(3) and R. 5:1-3(b)(2) contemplate that a matter that could be heard in the municipal court actually be heard in the Family Part and not that a Family Part judge spoke as a municipal court judge. That is exactly what took place here. Municipal court matters were routinely transferred to the Chancery Division, Family Part, pursuant to a policy implemented by the Sussex County Prosecutor and the Family Part in Sussex County because Mrs. Tafuto had filed a

domestic violence complaint in the Family Part. The court rules just cited provided the authority for the implementation of the stated policy. R. 3:23-1, which provides for appeals to the Law Division from "a court of limited jurisdiction" was inapplicable because the Chancery Division is not a court of limited jurisdiction. The appeal to the Law Division was properly dismissed by Assignment Judge Stanton.

Both the order dismissing the appeal to the Law Division and the judgment of conviction for simple assault are affirmed.

SUPREME COURT OF NEW JERSEY

M-1130/1131

SEPTEMBER TERM 1995

41,814

STATE OF NEW JERSEY

Plaintiff-Movant,

v. ORDER

Louis S. Tafuto,

Defendant-Respondent

This matter having been duly presented to the court, it is ORDERED that the motion to strike (M-1130 is granted; and it is further

ORDERED that the motion to dismiss (M-1131) is dismissed as moot.

Witness, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 7th day of May, 1996.

/s/

CLERK OF THE SUPREME COURT